UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 02-60-B-S
	)	
WILLARD HARTSOCK,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON GOVERNMENT'S MOTION FOR RULE 104(A) PRELIMINARY DETERMINATION OF ADMISSIBILITY

This matter is before the Court on remand from the First Circuit Court of Appeals, following that court's determination that 18 U.S.C. § 921(33)(B)(i)(I) and (II) provide affirmative defenses to a person charged with a violation of 18 U.S.C. § 922(g)(9). Pursuant to the opinion of the Court of Appeals, the defendant bears the burden of production and persuasion to establish that his state conviction for a misdemeanor crime of domestic violence was obtained in the absence of an intelligent and knowing waiver of his right to counsel and/or a jury trial. United States v. Hartsock, 347 F.3d 1, 6-7 (1st Cir. 2003). For the purpose of this case, both sides have agreed that the determination will be made by the court, prior to trial. Id. at 4& n.3. The matter was referred to me for an evidentiary hearing, which I held on January 12, 2004. I now recommend that the Court adopt my proposed findings of fact and rule, with respect to the United States's motion (Docket No. 5), that the conviction obtained in the Maine District Court, Division of Somerset, on June 29, 1992, is inadmissible because Hartsock has proven that he did not knowingly and intelligently waive his right to counsel.

Proposed Findings of Fact

Willard Hartsock is a forty-one year old elevator mechanic with a high school education and no formal legal training. Prior to the inception of the instant charge, his contact with the criminal justice system consisted of two offenses in the 1991-1992 timeframe. In one instance he pleaded guilty to operating under the influence ("OUI") and received a fine. In the second instance, the predicate state crime of misdemeanor violence alleged in this federal indictment, Hartsock also pleaded guilty and received a fine and a forty-eight hour jail sentence. In neither instance did Hartsock have an attorney representing him or consult with a criminal defense attorney prior to entering his guilty plea. In fact, Hartsock's only formal attempt at obtaining legal representation was to retain an attorney to handle his 1991 divorce. Ultimately, that attorney did not attend the divorce hearing on Hartsock's behalf and the divorce was resolved by his wife's attorney handling the hearing before the court.

Hartsock provides little by way of recollection relating to the events of March 4, 1992, his initial appearance before the Maine District Court. I therefore base my findings about that court appearance on the deposition of District Court Judge Douglas Clapp, the judge who most likely presided at the arraignment,[1] and the testimony of Brent McSweyn, a Special Agent with the Bureau of Alcohol, Tobacco, and Firearms, who listened to the March 4, 1992, archived tape-recording of the arraignment on November

[1] The State court docket entries do not indicate who presided at the arraignment, although Judge Clapp is clearly docketed as the judge who accepted the guilty plea some months later. Furthermore, Agent McSweyn testified that he listened to the tape of the arraignment and that Judge Clapp presided. Additionally, Judge Clapp testified at his deposition that a check of the clerk's other records revealed that he had been presiding on March 4, 1992, in Skowhegan. (Clapp Dep. at 6).

1, 2000, and took notes of what was said.[2] According to McSweyn, when Hartsock individually approached the bench, Judge Clapp asked him if he was going to hire a lawyer and Hartsock replied in the affirmative. He entered his plea of not guilty and Judge Clapp advised him, "You should see your lawyer as soon as possible." (See also McSweyn Aff., Docket No. 22.)

Judge Clapp's deposition testimony provides a few additional details of what more likely than not occurred that day. Judge Clapp has followed the same arraignment procedure since 1986. (Clapp Dep. at 8.) He initially informs the entire group of arraigned individuals of certain rights, including the right to a jury trial, the right to counsel, and the availability of appointed counsel for indigent defendants. It is fair to infer that Hartsock was advised of those basic rights on March 4, 1992. Neither Hartsock nor McSweyn offer any testimony about the jury trial request form. Judge Clapp testified that the practice was to hand the defendant a blank jury trial request as he left the courtroom. (Clapp Dep. at 10). However, the docket entries in this case indicate that a jury trial request form was "sent." Hartsock testified that the address on the docket sheet, "P.O. Box 382, Greenville Junction, Maine" was not a post office box at which he ever received mail.

I find that Hartsock was most likely told about his right to a jury trial and most likely received the written request form that day at court.[3] In any event, I am satisfied

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[2] The tape itself, identified as tape No. 2045, has since been destroyed in the normal course of document destruction of state court records. Likewise, tape number 2098, recording the June 29, 1992, change of plea, has been destroyed. Prior to its destruction Agent McSweyn also listened to that tape.

[3] I admit that this inference is based not only upon Judge Clapp's deposition, but also my own personal experience as a Maine District Court judge during the period from 1985-1990, a position that included presiding at the Skowhegan courthouse. I believe that the state computer docketing system in use at that time would automatically generate, simultaneously, the prompts for the four docket entries that appear on March 4, 1992. (See Def.'s Ex. No.2.) The docket entry "sent" does not necessarily mean mailed, United States Postage prepaid. As Judge Clapp explained, most of the thirty-three Maine District Courts did not

that, based on the record before me, Hartsock has failed to generate a factual issue about whether or not he intelligently and knowingly waived his right to a jury trial. The record fully supports the conclusion that he was informed of his right to have his case decided by a jury and what procedure to follow to obtain a jury trial. This case is not about his failure to knowingly and intelligently waive that right. Under Maine procedures applicable to him, he waived his right to jury trial. See State v. Holmes, 2003 ME 42, ¶ 8, 818 A.2d 1054, 1057 (holding that an effective waiver of the jury trial right occurs where the District Court judge, under Maine Rule of Criminal Procedure 22(a), administers the rule in a manner "that ensures each defendant is fully aware: (1) of his or her right to a jury trial; (2) of how to secure a jury trial; and (3) that failing to make a timely request constitutes a waiver of this right").

After being informed of his right to a jury trial and his right to counsel, Hartsock returned to court on June 29, 1992, believing that if convicted of the charge he would pay a fine as he had done in connection with his prior OUI charge. Hartsock did not consult with an attorney prior to his return to court. When Hartsock arrived at the courthouse he was approached by an assistant district attorney who took him into a small conference room to discuss his case. The assistant district attorney told him that if he did not plead guilty he faced the likelihood of a sixty-day jail sentence and a $1,000 fine upon conviction. However, the assistant district attorney offered to recommend a forty-eight hour jail sentence and a $300 fine in exchange for a guilty plea. Hartsock credibly testified before me that he was frightened by the specter of the sixty-day jail sentence and

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routinely mail jury trial requests to defendants appearing for arraignment, the postage costs being one consideration and the clerical effort being another. No busy clerk's office, such as the Skowhegan District Court, would be likely to have time to mail jury trial requests on the same day that it was processing arraignments for defendants, with the attendant clerical work of preparing bail bonds, fine receipts, and so forth.

he believed that he had no option other than to plead guilty and receive the lesser sentence. Shortly after the conversation in the conference room Hartsock went before Judge Clapp with the assistant district attorney at his side and tendered his plea of guilty pursuant to the plea agreement.

According to Agent McSweyn's notes and recollection, Judge Clapp asked Hartsock if he had talked to an attorney before pleading guilty. Hartsock responded affirmatively because he had spoken with the assistant district attorney, who had given him "advice" before entering the courtroom. Significantly, McSweyn does not recall, nor does the docket reflect, that there was any significant discussion between the judge and Hartsock about waiving the right to speak with his own counsel before the plea was entered. Nor does McSweyn remember that the tape suggested that Judge Clapp asked the name of the attorney, why the attorney was not present, or the nature of the advice that Hartsock had received. Judge Clapp testified that his normal practice before accepting a guilty plea that would result in a jail sentence was to discuss with the defendant his waiver of counsel and have the defendant sign a waiver of counsel form in the courtroom. (Clapp Dep. at 28 – 30.) Hartsock denies that such a conversation occurred on June 29, 1992. All of the corroborating evidence in this case supports Hartsock's testimony that there was no such discussion at the time of this plea and that he did not in fact understand that he still retained the right to speak with his own private attorney before changing his plea to guilty. Once he became aware of the likely ramifications flowing from a conviction for this offense, Hartsock never knowingly waived his right to counsel.

Discussion

Despite all of the ink that has been spilled in this case in anticipation of the resolution of this issue, the facts are actually very simple. When did Hartsock make a knowing and intelligent waiver of his right to counsel? Certainly not on March 4, 1992, when everyone agrees he told the judge he intended to consult with an attorney. Can a finding of waiver be based on Hartsock's inaction between his March 4 arraignment and the June 29 hearing date? Perhaps based on the passage of time coupled with Hartsock's appearance in court on June 29 without counsel? The government has not cited any authority to that effect, although there is state court authority regarding the waiver of a jury trial in Maine based upon the failure to make a timely demand and there are some Fifth Amendment cases suggesting that the right to remain silent can be waived by conduct. I am not aware of any Sixth Amendment case standing for the proposition that a knowing and intelligent waiver of the right to counsel takes place by drawing inferences adverse to the defendant based upon his mere appearance and entry of a plea of guilty. See Estelle v. Smith, 451 U.S. 454, 471, n. 16 (1981) (waivers of the assistance of counsel must be voluntary and must also constitute a "'knowing and intelligent relinquishment or abandonment of a known right or privilege,'" an inquiry that depends on that facts and circumstances of each case)(quoting Edwards v. Arizona, 451 U.S. 477, 482 (1981)). Does showing up for court amount to a waiver of the right to counsel? Although I can appreciate that Hartsock appears to have gone to the June 29 hearing fully intending to forego the assistance of counsel, it is also evident that his decision to do so was based on a mistaken belief as to the likely sentence as a consequence of a domestic assault conviction, which was based on an assumption that it would be no greater than it

had been for his prior OUI conviction. Both OUI and assault are Class D crimes under Maine law and he would have been told on his first appearance that both charges carried the same maximum potential sentence. In my view, showing up at court without retaining an attorney does not rise to the level of a knowing, intelligent waiver of the right to counsel when Hartsock had no understanding of the actual consequences of a conviction until an assistant district attorney told him that the likely sentence was sixty days in jail.

The United States does not contend that Hartsock somehow waived his right to counsel by speaking with the assistant district attorney prior to entering his plea, nor could it. If anything, Hartsock's meeting with the prosecutor complicates, rather than simplifies, the matter. Given Hartsock's limited knowledge of the legal system, he legitimately believed that if he did not do as advised by the prosecutor, he would most probably spend sixty days in jail. But the prosecutor's plea offer was not what we understand as "advice of counsel." See Reed v. United States, 354 F.2d 227, 229 (5th Cir. 1965) (Griffin B. Bell, J.) ("One of the most precious applications of the Sixth Amendment may well be in affording counsel to advise a defendant concerning whether he should enter a plea of guilty.").

The only remaining occurrence on which the Court might base a finding of waiver involves the plea colloquy that took place between Hartsock and Judge Clapp on June 29, 1992. But there is nothing in the record to suggest that Hartsock was ever advised by Judge Clapp that his failure to retain an attorney did not preclude him from then seeking one, particularly in light of the exchange that transpired between Hartsock and the prosecuting attorney that led to the plea agreement involving a jail sentence. This lack of

colloquy is significant because Hartsock did not consider he had any option other than to plead guilty or risk an extended term of imprisonment if he defended himself that day without representation. Based upon Hartsock's testimony and the surrounding circumstances, the judge did not conduct any such inquiry and Hartsock never knowingly gave up his right to counsel on June 29.

McSweyn's affidavit (Docket No. 22) and testimony at the hearing on this motion corroborate Hartsock's position that he never waived counsel before tendering his guilty plea and, in fact, he did not know that he still had the right to consult with his own private defense attorney. While McSweyn remembers that the March 4 tape contained a detailed question and answer about the right to counsel followed by the judge's admonition that Hartsock should contact counsel promptly, his recollection of the June 29 tape contains no such specificity. In fact, McSweyn testified that he cannot remember the judge's question that prompted Hartsock's response "that he had received advice from an attorney but that he does not have one representing him although he previously indicated he would." (McSweyn Aff., Docket No. 22.) Thus it appears unlikely that Judge Clapp followed his routine procedure of reminding the defendant of his right to counsel and obtaining a written waiver of that right before he accepted the guilty plea in this instance. (See Clapp Dep. at 18 -19.) The lack of any such colloquy between the judge and Hartsock underscores the validity of Hartsock's position that he never waived counsel when pleading guilty on June 29, 1992, because he did not know that he retained to right to seek the advice of his own counsel.

Hartsock did not possess a good grasp of how the legal system works. His sole prior experience with a lawyer, the one he hired to handle his divorce, resulted in the

court process being handled by the other side's counsel. After speaking with the assistant district attorney, he quite legitimately believed that he was indeed between the proverbial "rock and hard place." If he did not accede to the plea offer proposed by the assistant district attorney, he ran what appeared to him to be a real risk of serving a much longer jail sentence and paying a much higher fine. Allowing the advice of the "other side's" attorney to carry the day corresponded with Hartsock's prior experience of how court procedures work. Thus, his testimony that he pleaded guilty because it was the only alternative is entirely credible to me.

In order to prevail on this motion Hartsock must prove that he actually did not knowingly waive the right to have an attorney's advice. Proving the existence of a negative puts any litigant in any unenviable position. Yet, even assuming that Hartsock is held to highest burden of persuasion, I see no reason in this instance to doubt his testimony that he did not knowingly give up the right to independent advice of his own counsel before pleading guilty to the charge. He had no idea that he retained such a right in these circumstances.

The First Circuit has directed that a determination regarding whether a defendant has waived his right to counsel must be made in a non-formulaic manner with the trial judge giving close attention to the contextual inquiry in order to determine if there has been a legitimate waiver. See, e.g., Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir. 1976).[4] When considering the question of waiver of counsel in cases involving a guilty plea where no waiver inquiry appears on the record, this court must then look to "'the particular facts and circumstances surrounding that case, including the background,

[4] Of course, this case is not about a waiver of counsel at trial and, therefore, the factors enumerated in cases such as United States v. Campbell, 874 F.2d 838, 845 (1st Cir. 1989), may have little relevance to the determination.

experience and conduct of the accused.'" United States v. Kimmel, 672 F.2d 720, 722 (9th Cir. 1982) (quoting Cooley v. United States, 501 F.2d 1249, 1252 (9th Cir. 1974)).[5] The reason there can be no simple formula applied to the case is that the test concerns what the defendant understood rather than what the court said. Id. In this case Hartsock has persuaded me that he did not understand the dangers of self-representation. Nor did he understand that on June 29, 1992, after speaking with the assistant district attorney, he still had the right to consult with his own attorney before changing his plea to guilty. Hartsock has persuaded me that he did not knowingly and intelligently waive his right to counsel before pleading guilty to this charge.

Conclusion

Based upon the foregoing I recommend that the court rule that the June 29, 1992, conviction offered by the United States in support of this indictment be ruled inadmissible because Willard Hartsock has proven that he did not knowingly and intelligently waive his right to counsel at the time he entered his plea of guilty.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

[5] This contextual approach to the waiver analysis is followed by more courts than the First and the Ninth Circuit. Indeed, it is just such an approach taken by the Supreme Court of Iowa in State v. Tovar, 656 N.W.2d 112 (2003), a case in which the court concluded there was not a valid waiver of the right to counsel in an operating under the influence plea conviction used as a predicate offense. The United States Supreme Court has granted the State's petition for certiorari review, 124 S. Ct. 44 (2003) (mem), and that decision may (or may not) illuminate disputes of this ilk.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

January 21, 2004.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 1:02-cr-00060-GZS-ALL
Internal Use Only

Case title: USA v. HARTSOCK
Other court case number(s): None **Date Filed:** 08/06/02
Magistrate judge case number(s): None

Assigned to: JUDGE GEORGE Z. SINGAL
Referred to:

Defendant(s)

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Pending Counts	**Disposition**
18:922G.F UNLAWFUL	

TRANSPORT OF FIREARMS, ETC.; POSSESSION OF FIREARM BY A PERSON CONVICTED OF DOMESTIC VIOLENCE
(1)

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
None	

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